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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-331

HOWARD YEAGER, Warden, *Petitioner*

v.

UNITED STATES EX REL. EDGAR SMITH, JR., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Restatement of Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Introductory Statement	3
Counterstatement of Facts	6
A. An Overview of Coercive Effect	7
B. The Details of Coercion	8
(1) Statement #1—the 10:00 a.m. breakdown	8
(2) Statement #2—The Q. and A. Statement	11
(3) Statement #3—The post-indictment "accuracy" admission	12
(4) Statements #4, 5, 6—The psychiatric interviews	13
Reasons To Deny the Writ	15
1. The Coercion Analysis Was Sound	15
2. An Evidentiary Hearing Was Mandatory	19
3. There Was No Failure To Exhaust State Remedies	21
4. There Was No Abuse of the Writ	23
Conclusion	24
Appendix	25

TABLE OF AUTHORITIES

Cases:	Page
Adamson v. California, 332 U.S. 46 (1947)	19
Barber v. Gladden, 327 F.2d 101 (9th Cir. 1964)	6
Brown v. Allen, 344 U.S. 443 (1953)	22
Brown v. Krouse, 425 F.2d 305 (8th Cir. 1970)	6
Chessman v. Teets, 354 U.S. 156 (1957)	23
Davis v. North Carolina, 384 U.S. 737 (1966)	15
Escobedo v. Illinois, 378 U.S. 478 (1964)	4
Fay v. Noia, 372 U.S. 391 (1963)	22
Fikes v. Alabama, 352 U.S. 191 (1957)	15
Harris v. New York, 401 U.S. 222 (1971)	14
Haynes v. Washington, 373 U.S. 503 (1963)	4
Johnson v. New Jersey, 384 U.S. 719 (1966)	15
Leyra v. Denno, 347 U.S. 556 (1954)	16
Linebarger v. Oklahoma, 404 F.2d 1092 (10th Cir. 1968)	6
Malinski v. New York, 324 U.S. 401 (1945)	6, 15, 16
Malloy v. Hogan, 378 U.S. 1 (1964)	19
Massiah v. United States, 377 U.S. 201 (1964)	12, 13, 17
Miranda v. Arizona, 384 U.S. 436 (1966)	15
Rogers v. Richmond, 365 U.S. 534 (1961)	23
Sheppard v. Maxwell, 384 U.S. 337 (1966)	23
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)	17
Smith v. New Jersey, 322 F.2d 810 (3rd Cir. 1963)	6
Smith v. Yeager, 393 U.S. 122 (1968)	4, 22, 23
Spano v. New York, 360 U.S. 315 (1960)	6, 18
State v. Smith, 43 N.J. 67 (1964)	22
Townsend v. Sain, 372 U.S. 293 (1963)	3, 20, 22
Turner v. Pennsylvania, 338 U.S. 64 (1948)	16
Twining v. New Jersey, 211 U.S. 78 (1908)	19
United States ex rel Smith v. New Jersey, 201 F. Supp. 272 (D.N.J. 1962)	22
United States ex rel Wiggins v. Pennsylvania, 430 F.2d 650 (3rd Cir. 1970)	6
Watts v. Indiana, 338 U.S. 49 (1949)	16
Wong Sun v. United States, 371 U.S. 471 (1963)	13, 17

STATUTES AND RULES:

Page

28 U.S.C. § 2254 ..... 1, 2, 3, 20, 25

Rule 52(a), Fed.R.Civ.Proc. 2, 5, 6, 15

N.J.R.R. 3:2-3 ..... 2, 29

N.J.S. 2A:163-2 ..... 2, 18, 27

MISCELLANEOUS AUTHORITIES:

Inbau and Reid, Lie Detection and Criminal Interrogation (3rd ed. 1953) 16

Inbau, Police Interrogation—a Practical Necessity, 52 J. Crim. L.C. and P.S. 16 (1961) 16

O'Hara, Fundamentals of Criminal Investigation, Ch. 9 (1956) 16

Savage, A Great Fall (1970) 16

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OPINIONS BELOW

The opinions below are as yet unreported. They appear in the Appendix to the Petition.

JURISDICTION

The judgment of the Court of Appeals affirming the grant of the writ of habeas corpus by the District Court was entered on August 2, 1971. The Petition for Writ of Certiorari was timely filed on September 7, 1971. It invokes the jurisdiction of this Court under 28 U.S.C. § 2254(1), the habeas corpus statute. Jurisdiction properly lies under 28 U.S.C. § 1254(1).

RESTATEMENT OF QUESTIONS PRESENTED

1. Was there sufficient evidence to support the factual findings of the District Court, unanimously affirmed by the Court of Appeals, as to the circumstances surrounding respondent's six in-custody statements?

2. Did the Court of Appeals err, after its own "independent review of the evidence," in concluding unanimously that all six statements were coerced, or the fruit of coercion, under the 1957 "totality of the circumstances" standard?

3. Was respondent entitled to an evidentiary hearing in federal habeas corpus?

4. Did the respondent fail to exhaust his state remedies or otherwise "abuse" the writ of habeas corpus?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The State omits to present the relevant 1957 New Jersey Statutes and Rules pertaining to the issues of arraignment delay and compelled psychiatric interviews. N.J.R.R. 3:2-3 and N.J.S. 2A:163-2. They are set forth in Appendix A to this Brief together with the full relevant federal habeas corpus statute, 28 U.S.C. § 2254, amplifying the excerpts printed in the Petition.

In addition, Rule 52(a), Fed. R. Civ. Proc. provides, in relevant part:

> In all actions tried upon the facts without a jury . . . the court shall find the facts specially . . . . Findings of fact shall not be set aside, unless clearly erroneous and due regard shall be given the opportunity of the trial court to judge of the credibility of the witnesses.

INTRODUCTORY STATEMENT

At his trial in 1957 six in-custody statements of the respondent, Edgar Smith, were used to convict him: (1) oral admissions at 10:00 a.m. after a sleepless night of interrogation; (2) a transcribed Q. and A. at noon; (3, 4, 5) three statements to State psychiatrists; and (6) a ratifying admission knowingly and deceptively obtained after indictment in the absence of retained counsel.

Prior to this ten-day habeas corpus proceeding in which more than 1500 pages of testimony were taken, principally from State officials, *no court,* state or federal, including the original trial court, had heard so much as one word of testimony pertaining to the constitutional status of five of these statements. The transcribed Q. and A. was subject to a peculiar and truncated hearing at trial, held partly in and partly out of the presence of the jury. The trial hearing yielded less than 30 pages of testimony and dealt almost exclusively with the circumstances of the noontime questioning itself, thereby all but ignoring the 13 hours of questioning that had preceded it.

The trial court found no specific facts. Indeed its "findings" are so starkly at odds with the evidence presented here by the State's own witnesses that they speak eloquently to the need for such evidentiary hearings where, in the terms of 28 U.S.C. § 2254(d) and *Townsend* v. *Sain,* 372 U.S. 293 (1963), "the material facts were not adequately developed" or "not resolved" at the State court trial. The trial court "found" as follows:

> On the question of voluntariness the Court finds there is *no evidence* of duress or persuasion, any inducement offered, any promise offered, *no evi-*

> *dence* of either physical or verbal duress of any kind upon the defendant *at the time the questioning took place.* (Emphasis supplied) (T. 525a) [1]

For fourteen years, virtually from the start of his incarceration, respondent sought judicial relief from these naked "findings." Critical allegations such as official interference with access to wife and counsel were urged well before such cases as *Haynes* v. *Washington,* 373 U.S. 503 (1963) and *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) gave full prominence to them in coercion analysis.[2] Yet petition after petition was denied, *without a hearing,* relying solely on the skeletal state court record. It is thus utterly misleading for the State to say here, as it does repeatedly in lengthy footnote 1, (Pet. 6-7) that prior denials of relief have rested upon "extensive review of the facts" or "thorough review of the facts and circumstances," or "fully adjudicated" proceedings. For, although this habeas petition was filed in 1965, it was not until this Court remanded this case, *Smith* v. *Yeager,* 393 U.S. 122 (1968), rejecting allegations of "waiver" and "abuse of the writ," that the first and only evidentiary hearing was held.

At the habeas hearing, the State's own witnesses brought to light for the first time what *really* had happened during Smith's night-long detention prior to the

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[1] References (T.) are to the transcript of the original trial. References (H.) are to the transcript of this habeas corpus proceeding. References (Pet.) are to the State's Petition filed here.

[2] See e.g., Exhibit B to the Petition for Writ of Habeas Corpus, Affidavit dated January 30, 1962. It is contained in the Record of this case which has been forwarded to this Court in connection with the State's petition.

formal noontime Q. and A. The level of interrogation throughout the night was established as "far from casual or routine" and designated to "wear down resistance to meaningful interrogation."[3] Allegations of denial of access to his wife and the State's attempt to derail her from contacting counsel were substantiated. The absence of warnings of any kind was confirmed. Evidence of threatening, if mild, physical abuse was confessed. A backroom interrogation at 10:00 a.m., planned "to get this guy to talk" and to include coercive suggestions of leniency and provocation, was firmly established, for the first time, by the officials responsible. And both investigating prosecutors acknowledged that although arraignment was required under New Jersey law early in the morning and would have supplied the missing warnings, it was intentionally delayed for 7 hours for no purpose other than to obtain a "voluntary" statement in a form usable at trial. (Pet. 42a, 22a; H. 604, 608, 612, 620, 1008-09, 1044ff, 1086ff, 1107-08).

These are but a few of the "new facts" brought to the surface by the first full hearing into the circumstances of Edgar Smith's prolonged incommunicado detention. The State's suggestion that "no new facts" were elicited is perhaps the most colossal of its distortions of the record. (Pet. 25). But the motivation for such a tactic is transparent. Having failed to con-

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[3] The State persists in characterizing the 13-hour-long interrogation as taking place "intermittently at a relaxed pace." (Pet. 14). This characterization is typical of its attempts in this Court to relitigate the facts and otherwise understate, tone down, and wholly ignore testimony produced by its own witnesses. These attempts to circumvent the "clearly erroneous" standard of review, Fed.R.Civ. Proc. 52(a), fell flat in the Court of Appeals. Other instances are noted elsewhere in this Response.

vince the Court of Appeals that the District Court clearly erred in its findings of fact, Fed. R. Civ. Proc. 52(a), the State now contends that those facts had always been clearly established.[4]

COUNTERSTATEMENT OF FACTS

For a full statement of the facts, we respectfully refer this Court to the exhaustive opinion of the District Court.[5] (Pet. 7a-46a). The basic factual elements, however, should be recounted here.

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[4] The State's limited conception of a "new fact" explains why it finds none. Consider just one example. Comparing this case with the case presented in 1963 *on the state record* to the Third Circuit, *Smith* v. *New Jersey*, 322 F.2d 810, the State observes that arraignment delay was known then, as now. But it ignores the new disclosure in this hearing that the arraignment was delayed for the express and only purpose of obtaining the statement. Yet it was precisely the absence of such evidence of "purpose", that enabled the 1963 Third Circuit to distinguish this case from *Mallinski* v. *New York*, 324 U.S. 401 (1945). See *Smith* v. *New Jersey*, *supra*, at 811. *See also*, *Spano* v. *New York*, 360 U.S. 315, 323-24, for the consequences of a showing that officers had an "undeviating intent" to get a statement.

[5] These findings were largely undisputed (Pet. App. 39a) and the State's effort to show "clear error" on appeal was utterly unavailing. Fed.R.Civ.Proc. 52(a). The Courts of Appeal are in full accord that factual findings by the District Court in habeas corpus are governed by the "clearly erroneous" standard of review under Rule 52(a). See *e.g.*, *United States ex rel Wiggins* v. *Pennsylvania*, 430 F.2d 650 (3rd Cir. 1970); *Barber* v. *Gladden*, 327 F.2d 101 (9th Cir. 1964); *Linebarger* v. *Oklahoma*, 404 F.2d 1092 (10th Cir. 1968); *Brown* v. *Crouse*, 425 F.2d 305 (8th Cir., 1970).

On the ultimate issue of voluntariness, the Court of Appeals makes, and made here, an "independent review" of the record.

A. An Overview of Coercive Effect

This record is remarkable for the concrete picture it presents, painted by the State's own witnesses, of a subject's gradual collapse under mounting coercive pressure. The breakdown interrogation took place at 10:00 a.m., after a sleepless night of repeated questioning. Prior to 2:00 a.m., at police headquarters, Smith "appeared normal, he appeared courteous, he didn't appear concerned at all". (H. 190). Some of the State's witnesses described him as "calm, cool, collected" (H. 178), "confident" (H. 209), even "cocky" (H. 538). By 2:30 a.m., after 3 hours of questioning and a trip in the cold to check his story, a detective described Smith as "quite subdued, he was hanging his head, where he hadn't done that previously". (H. 209).

By early morning, after the questioning had become "more distinctive or more impressive" (T. 481, H. 1201), after a second trip in the cold under armed guard, after hairs had been pulled from his head (T. 671, H. 1201, 1411), after his request to phone his wife was denied (Pet. 18a, 20a, H. 1282-83), and after he had been stripped for examination, the State's doctor described Smith as "very restless and apprehensive and markedly agitated" (H. 546, 568). Shortly after 9:00 a.m. (H. 67), now at the Prosecutor's office amid a mounting crowd of press and populace, and in a room with 7 detectives (H. 264), after he had been confronted with bloody trousers (H. 67), and after scrapings had been taken of his fingernails, Smith was driven to say, "I am getting out" and "he started to get up".[6] (H. 279). He was pushed back into his

[6] Smith's exasperated state of mind by this time is nowhere better manifest than by this purported attempt to escape from a room full of detectives into the halls of the prosecutor's office in a courthouse crowded with press, laymen and other officials.

chair, and fell backward onto the floor. (H. 279-80, 332, 395). Minutes later, garbed now in prison coveralls (H. 104, 265) and "closeted" in isolation for a planned interrogation (H. 791, H. 1038, 355, 337-365), including an implied promise of leniency, at the hands of experienced interrogators (H. 371) who had worked together before (H. 797), Smith "broke down. He sobbed". (H. 775, 294-5). His first admissions of contact with the victim came forth.

The lead interrogator testified that the "underlying point" of this culminating interrogation was to "get this guy to talk". (H. 377). And that plainly worked.

B. The Details of Coercion

(1) Statement #1—the 10:00 a.m. Breakdown

Smith was taken by two detectives, acting under orders to bring him to Police Headquarters at about 11:00 p.m. (H. 651). As the District Court found, he was, from the start, under the impression that he was in custody, never advised otherwise, and in fact in such custody. (Pet. 13a). (H. 46, 81-83, 222-23, 621-622, 536). All through the night and morning he was never free of official presence or left unguarded. He was never warned of any rights (H. 226, 518, 623). He was never permitted to sleep and was ill and could eat little.[7] Virtually from the outset, he was subjected

[7] Relitigating still, the State tells this Court that he was "supplied with food and drink on a regular basis", (Pet. 14) and "had breakfast." (Pet. 8). The District Court found that he was offered food twice (Pet. 14a, 18a), could not eat at first, but "probably did eat something" at breakfast, though he was, as he testified, "undoubtedly tense and ill", at breakfast time. He was not offered lunch and did not eat again until many hours after his statement was obtained.

to questioning by relays of skilled prosecutors and detectives from the prosecutor's office. The District Court found that as early as 2:30 a.m. interrogation became intensive. (Pet. 15a, T. 481, H. 1068, 1070-74, 1201). Before long, he was asked to visit the morgue, a technique found to be a part of a mounting process geared to wear down his resistance to questioning. (Pet. 15a, H. 1068, 1070-74).

During the night, Smith was twice taken on extended trips in the cold. The questioning continued throughout and by 4:00 a.m., at the latest, (Pet. 21a) he was the "prime suspect and focus of the investigation." Indeed, the State paid no attention to anyone else from that point on.

At about sunrise, in the presence of an armed guard, Smith was taken to a diner. There he "probably" had something to eat but was "undoubtedly tense and ill." (Pet. 18a, H. 1274). When he requested permission to telephone his wife or to be driven to his mother-in-law's home nearby, his requests were denied. (Pet. 18a). Thereafter, he was stripped naked for a medical examination in the presence of a detective and the State's doctor found him apprehensive and markedly agitated. (H. 567, 568, Pet. 19a).

At about 8:30 a.m. Smith was taken to the Office of the Prosecutor at the Hackensack Courthouse where the breakdown interrogation took place at 10 a.m. There his knee injuries were photographed by a press photographer, and detectives then took his fingerprints, fingernail clippings, and scrapings. Earlier that evening a sample of hair had been pulled from his head although Smith had asked to do it himself.

Prior to the breakdown questioning Smith was permitted to call his wife, but after officials heard him ask her to contact a specific attorney, a detective was dispatched to pick her up. Her presence at the Courthouse was then made known to Smith, and he realized that his "effort to reach an attorney had been frustrated. . . ." (Pet. 41a, H. 1284). Smith then made an "effort to leave" (Pet. 42a), but was forcibly pushed into a chair and fell backwards onto the floor. (H. 279-80, 332, 395). His clothing was then removed and he was garbed in prison coveralls for the critical interrogation. At this time the State already had the list of incriminating items set forth in the District Court's opinion, more than ample for arraignment. (Pet. 21a).

The breakdown interrogation was conducted by a new and well-rested team of two experienced detectives. They testified that Smith was "closeted" for a formal interrogation. (H. 268, 360-61). The questioning proceeded according to a pre-conceived plan designed to culminate in a question, carefully timed, that would assume Smith's involvement with the girl but suggest that he was provoked. The lead interrogator testified that he had learned, and applied here, certain techniques: Develop a common ground with the suspect, in this case religion, to win his confidence. Then establish a difference between the interrogator and his subject, in this case by emphasizing scientific techniques that would soon solve the crime. Then suggest that the victim may have been partly responsible for the incident. (See e.g., H. 335-365). It was in this connection that a discussion took place about another case which pointedly contained an implied suggestion that lenient treatment would be accorded those who coop-

erated. Smith was then told that in this case "whoever committed the act must have done so with great provocation". (H. 351-360). The critical question was then put to him: "What did she do to you?". He broke down, cried, and admitted that "She hit me". This was the first time he had acknowledged any connection with the girl on the night of the homicide.[8]

At some later point, Smith was permitted to speak with a priest. Although the State characterizes this as a mitigating influence, in fact the idea was advanced by an interrogator as part of the "religion" phase of the interrogation plan, (Pet. 24a, H. 800, R. 40), and accepted by the Prosecutor when he was told that Smith wanted "to make a confession". (H. 366-67). Just prior to this meeting with the priest, Smith was permitted to talk with his wife in the presence of at least one prosecutor.

(2) Statement #2—the Q. and A. Statement

Although these events took place in the courthouse equipped for arraignments, arraignment was deliberately delayed until late in the afternoon. Instead, the judiciary was called upon to assist in arranging a formal Q. and A. interrogation. Although no "disinterested witness" was privy to any prior questioning, the Assignment Judge obtained a member of the current jury panel to serve in that capacity at the formal session. A court reporter was likewise relieved of regular work to record the Q. and A. The prosecutor then put more than 300 questions to Smith in the Courthouse and at the scene of the crime. The session

[8] Smith has maintained that he was with the girl on the night of the homicide but was not responsible for her death.

at the Courthouse was secretly taped by means of a hidden microphone.

The secret electronic recording of this Q. and A. was disclosed for the first time at this hearing. It contains not only the orderly formal interrogation but inadvertent moments after it which, by their contrasting frenzy, point up the staged quality of the formal Q. and A. The District Court specifically found that: "The calculated steps taken to give an appearance of voluntariness during this interrogation are not convincing". (Pet. 43a).

(3) Statement #3—the Post-indictment "Accuracy" Admission

In the ensuing days, Smith was indicted and his family retained a lawyer. His lawyer informed the Prosecutor that he had given Smith instructions not to sign any statement. Nonetheless, undaunted *even after indictment, cf. Massiah* v. *United States,* 377 U.S. 201 (1964), the Prosecutor's Office dispatched a Detective to Smith's cell to get Smith to sign the transcribed Q. and A. or acknowledge its "accuracy". Smith followed his lawyer's advice and refused to sign but, unknown to him, an acknowledgment of "accuracy" was as lethal as a signature. It was used at trial as an acknowledgment, not simply that the statement had been properly transcribed, but that its truth-content was "accurate". In short, the Prosecutor had deceptively skirted the instructions of Smith's counsel and obtained a second confession ratifying the substance of the first. (T. 521, 633, 963). At this habeas hearing, the prosecutor who conducted the Q. and A. confessed that an "accuracy" acknowledgment would have been desired by his office to add to the "weight" to be

given to the prior statement.[9] (H. 725). And the District Court held that when Smith was confronted with the transcript of the prior coerced Q. and A., the ensuing "accuracy" admission was clearly "come at by exploitation" of the primary illegality.[10] *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963) (Pet. 44a).

(4) Statements 4, 5 and 6— the Psychiatric Interviews

In between indictment and the accuracy admission, Smith was removed three times from his cell by court order for the purpose of interviews with State psychiatrists. Smith's counsel consented to these interviews, described at this hearing by the Prosecutor as "routine . . . to find out what the mental status of an accused was at the time of commission . . ." (H. 1026). The District Court found that counsel's consent and the court orders were given pursuant to a common understanding at the Bar that the substance of such interviews could be used at trial only on the issues of

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[9] The State's distortion of the facts in this Court is nowhere better dramatized than in its presentation of this event. Wholly omitting to tell this Court that the Prosecutor's office was fully aware of counsel's instructions and sought to skirt them in counsel's absence, the Petition paints the following innocent picture:

> On March 11, 1957, Smith was confronted with a transcript of his stenographically recorded statement. Smith was requested to read the transcript, make any necessary corrections, and sign it. Smith read it and acknowledged its accuracy, but refused to sign it under advice of counsel. His acknowledgment of the accuracy of the statement as well as the statement itself were admitted at trial. (Pet. 11)

[10] Although a clear violation of the subsequently announced *Massiah* rule was involved, the District Court did not apply *Massiah* retroactively to this case. (Pet. App. 43a).

insanity or incompetence. (Pet. 33a-36a). At trial, when Smith had different counsel, these interviews, which encompassed references to events on the night of the homicide, were used to buttress the truth content of the prior Q. and A.[11] (T. 773-74, 931). At the habeas hearing, *the State sought admission of these psychiatric statements* on the grounds that they bore upon the issues of the voluntariness of the prior statements. Anticipating that the State sought to have it both ways—both to interject these statements at this hearing, and to avoid a ruling on their status at a possible retrial—petitioner asked the Court, upon the full record compiled herein, to rule upon their status so as to avoid still further future litigation about the confessory aspects of the Smith case.[12] (H. 8-15, 1513-1528). The District Court found that use of these statements should have been prohibited at trial for two reasons: (1) they resulted from the unbroken chain of coercive events, and (2) they were effectively compelled, since the consent permitting the interviews was given in the shadow of the court's power to order them even if consent were withheld. (Pet. 44a-45a).

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[11] The State understates the use of these statements at trial. They were not used simply to impeach Smith's credibility. (Pet. 31). They were used in summation as direct evidence of the truth of the prior Q. and A. (T. 931). *Harris* v. *New York*, 401 U.S. 222 (1971) is thus inapposite. (Pet. 31-32).

[12] The contention that Smith failed to exhaust State remedies with respect to statements *the State itself* brought into the hearing is thus frivolous. See point 3, *infra* at p. 21.

REASONS TO DENY THE WRIT

1. The Coercion Analysis Was Sound

The factual findings of the District Court, affirmed *in toto* by the Court of Appeals, are fully supported by the record and no question under the "clearly erroneous" standard of review is presented. Rule 52(a), Fed. R. Civ. Proc.

The unanimous legal conclusions of both courts presents only the question whether 1957 coercion law was sufficiently developed to warrant the findings of involuntariness. This Court should not sit to assess the status of its cases as of a given year.

Moreover, that assessment was properly performed below. The central statements leading to the grant of habeas corpus were the ones obtained behind the scenes at 10 a.m. and then in the show of "voluntariness" at the noontime Q. and A. The courts below properly applied the "totality of the circumstances" test in assessing voluntariness of these pre-*Miranda* statements. See e.g. *Fikes* v. *Alabama,* 352 U.S. 191, 197 (1957); *Johnson* v. *New Jersey,* 384 U.S. 719 (1966); *Davis* v. *North Carolina,* 384 U.S. 737, 739 (1966). The courts below did not, as the State charges, void Smith's conviction on a *per se* retroactive application of the *Miranda* rules. The absence of warnings was properly regarded relevant in the voluntariness determination, *Johnson* v. *New Jersey, supra* at 730, but not dispositive. (Pet. 39a).

The State errs too by misreporting the pre-1957 coercion cases. For example, *Malinski* v. *New York,* 324 U.S. 401 (1945) is presented in the Petition as involving "the confession of a suspect held incommunicado for four days in various locations until he con-

fessed. The confession followed continuous questioning". (Pet. p. 15 n. 4). In fact, the coerced *Malinski* confession was obtained after only 10 *hours* of daytime detention, at a hotel, and without persistent questioning. 304 U.S. at 403, 405. Although no two cases are precisely alike and *Malinski* presented its own aggravating circumstances, they were by no means more coercive than those presented here. This case includes, among many coercive events, an unlawful element of interrogative technique repugnant even to the staunchest advocates of vigorous interrogation—the implied promise of leniency.[13] *Inbau, Police Interrogation—a Practical Necessity,* 52 J. Crim. L. C. and P.S. 16 (1961). And the rest of the interrogative plan brought to bear upon Smith at 10:00 am. was likewise modeled upon a standard coercive pattern.[14] Moreover, other coercive features of the case were also established, by 1957, as relevant in voluntariness analysis. See e.g., *Turner* v. *Pennsylvania,* 338 U.S. 64 (1948) (absence of right to silence warnings, arraignment delay) *Watts* v. *Indiana,* 338 U.S. 49, 53 (1949) (warnings, experi-

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[13] "I am opposed, therefore, to the use . . . of threats, or promises of leniency . . . which will induce *an innocent person to confess.* . . ." Inbau, *supra* (emphasis is original).

[14] The alternating pattern of hard and soft questioning—establishing rapport but conveying confidence in police detection, culminating in a suggestion that the victim may have provoked the event—was established in interrogation manuals no later than 1953. See Inbau and Reid, *Lie Detection and Criminal Interrogation* (3rd ed. 1953); O'Hara, *Fundamentals of Criminal Investigation,* Cr. 9 (1956). This Court acknowledged the coercive impact of such psychological ploys earlier than 1957. See e.g., the interrogator's suggestion of the victim's provoking behavior in *Leyra* v. *Denno,* 347 U.S. 556, 562, 582 (1954). For dramatic evidence of their continued use in coercive settings, see Savage, *A Great Fall* (1970).

enced interrogators, arraignment delay, absence of counsel).

The coercion findings as to the other four statements are not critical to the grant of habeas corpus, but are relevant instead to retrial. There is no reason to review them now. Moreover, on the merits, these findings were correct.

The post-indictment "accuracy" admission is the clearest example of a fruit of prior coercion. The State could not possibly contend that it was derived from an "independent source". *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920). Nor could it credibly suggest that the taint of the prior illegality had been "attenuated" by intervening events. *Wong Sun* v. *United States,* 371 U.S. 471 (1963). The *Wong Sun* test of attenuation disposes of any such suggestion:

> Whether, granting the establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. 371 U.S. at 488.

If ever a second confession was "come at" by "exploitation" of an illegal preceding one, it was at the moment the Prosecutor's detective presented Smith with the transcript of the coerced Q. and A. and asked him to acknowledge its "accuracy".[15]

The three psychiatric statements, taken between the time of the Q. and A. statement and the post-indictment

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[15] The status of the "accuracy" admission as a fruit thus enabled the District Court to avoid reaching the questions whether: (a) the deceptive circumstances of this "confession" rendered it independently coerced and (b) the *Massiah* rule, plainly violated here, should be retroactively applied.

"accuracy" admission, were barred from use at retrial upon two grounds: (1) as intermediate links in the chain of coercive events (Pet. 44a); (2) as, in effect, compelled by court order. (Pet. 44-45a). Their role as intermediate links in the chain is manifest in the State's "undeviating intent" *Spano* v. *New York*, 360 U.S. 315, 323-24, to get usable statements from Smith—an intent that did not let up even days after he was indicted and represented by counsel.[16] In addition, the District Court found that Smith's counsel agreed to the psychiatric interviews only because, in the absence of consent, they could be compelled by court order. N.J.S. 2A: 163-2. Such agreement was customary at the Bar upon the understanding that interviews by consent, like those by court order, could only be used if the sanity question were raised at trial. Since Smith's counsel had instructed him not to sign the Q. and A., it is unthinkable that he would have licensed a new and unlimited interrogation in medical disguise, and the District Court so found. This finding, which is but

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[16] That intent was confessed by the prosecutor as the sole reason for the 7-hour arraignment delay. And the deceptive circumstances of the "accuracy" admission confirm that the intent persisted even after indictment, through the time of the psychiatric statements, until the "accuracy" admission was obtained. This Court has written, in terms fully applicable here:

> The police were not . . . merely trying to solve a crime, or even to absolve a suspect. . . . They were rather concerned primarily with securing a statement from defendant on which they could convict him. The *undeviating intent* of the officers to extract a confession from petitioner is therefore patent. *When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these.* *Spano* v. *New York*, 360 U.S. 315, 323-4. (emphasis supplied).

an alternative ground for exclusion at retrial, does not entail retroactive application of the Fifth Amendment privilege.[17] Cf. (Pet. 30).

2. An Evidentiary Hearing Was Mandatory

On remand from this Court, the State advised the Court of Appeals that Smith was entitled to an evidentiary hearing. In the District Court, it reversed that position and contended, *inter alia,* that Smith's counsel had waived a voluntariness hearing at trial by failing to object to the Q. and A. as involuntary. The trial record belied that, since although counsel wavered at first, a voluntariness challenge was made.[18] (T. 532, 534, 537).

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[17] The District Court referred to cases on the privilege against self-incrimination (Pet. 44a-45a) only for a third buttressing argument. Since counsel's consent was given in the shadow of the court's power to order these interviews, Smith's participation was not voluntary but effectively compelled by that power. In some forms, *actual* compulsion, which may be regarded as the core of the Fifth Amendment privilege, has always been repugnant to the Fourteenth Amendment even though all the particulars of the Fifth Amendment privilege (e.g., the comment rule) were not made applicable to the States until *Malloy* v. *Hogan,* 378 U.S. 1 (1964). Even the dissenters in *Malloy* acknowledged that much.

> ". . . coercion to incriminate oneself, even when under the forms of law . . . is inconsistent with due process." 378 U.S. 1 at 15, note 1 (Harlan J. dissenting).

As the District Court observed, *Twining* v. *New Jersey,* 211 U.S. 78 (1908) and *Adamson* v. *California,* 332 U.S. 46 (1947) held only that the Fifth Amendment is not binding upon the States. They dealt with a fringe Fifth Amendment protection (the comment rule) and did *not* hold that all forms of compulsory self-incrimination were consistent with Fourteenth Amendment Due Process.

[18] The initial failure to challenge voluntariness may well have resulted from the circumstance that under 1957 New Jersey discovery law, counsel did not receive a copy of the statement until the middle of trial. Moreover, the initial testimony on the Q. and A. was taken in the inhibiting presence of the jury.

Faced with the obvious truths that, as to the Q. and A., the "material facts were not adequately developed at the State court hearing" and as to the other statements, "the merits of the factual dispute were not resolved [at all] in the State court hearing," 28 U.S.C. § 2254(d)(3) and (d)(1), *Townsend* v. *Sain*, 372 U.S. 293, 313 (1963), the State sought to avoid the otherwise mandatory evidentiary hearing, *Townsend* v. *Sain*, *supra* at 313, by arguing *from the trial transcript* that these inadequacies must have been attributable to the "inexcusable neglect of petitioner. . . ." *Townsend* v. *Sain*, *supra* at 317.[19] Although the parties were then engaged in outlining the scope of proceedings, not once did the State offer to take testimony on that point. Moreover, although both petitioner and his trial counsel testified at this hearing, the State never sought to preserve a record by seeking testimony from them on the waiver issue.

In this Court, *without the slightest record on the subject*, the State again presses the waiver point with unfounded and abstract charges that "facts known to [the] petitioner were consciously withheld from the record of the trial proceedings". (Pet. 21). These charges, never specified, are both untrue and utterly unfit for review in this posture.[20]

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[19] That argument was frivolous. The State urged that counsel only partially developed the coercion facts because proving involuntariness was not his objective; he sought, instead, a hearing out of the presence of the jury to show that Smith's statement was not a confession. The complete answer to that argument is manifest in the trial transcript which shows that counsel did not pursue that line of questioning at the non-jury hearing. (T. 539-542).

[20] Did Smith "consciously withhold" evidence of the prosecutor's intent in delaying arraignment or of the interrogation plan hatched out of his presence?

3. There Was No Failure To Exhaust State Remedies

The State does not contend that Smith failed to exhaust State remedies with respect to the Q. and A. statement or the post-indictment "accuracy" admission, either one of which forms an independent basis for the grant of habeas corpus. The contention that he failed to present questions concerning the 10:00 a.m. admissions to the State courts is groundless for three independent reasons: (1) it was never briefed or argued to either court below and is thus raised in this Court for the first time;[21] (2) the 10:00 a.m. admissions were part of Smith's coercion claim in a State petition for habeas corpus denied by the Bergen County Trial Court on March 29, 1965 (Pet. 6, n. 1); and (3) consideration of the coercive events yielding the 10:00 a.m. admissions is a necessary part of the "totality of the circumstances" leading to the Q. and A. two hours later.

The exhaustion contention with regard to the psychiatric statements is no less groundless. The statements were offered at this hearing *by the State*. Since that offer itself raised a question as to the scope of consent given in 1957, the issue of the nature of that consent was subjected to full litigation. And since the consent question is the only issue relevant to determining their voluntariness, the District Court rejected the State's attempt to withhold the voluntariness question for some future proceeding. No considerations of "comity" required the District Court to permit the State to splinter consideration of the statements it

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[21] Indeed, in pre-hearing memoranda designed to frame the issues for this proceeding, the 10:00 a.m. admissions were specifically delineated without any such objection raised.

offered and postpone still further the final resolution of the confessory aspects of this 14-year old case.[22] Ironically, the State charges Smith with "abuse" of the writ by urging "certain grounds while holding others in abeyance". (Pet. 32). But its effort at "piecemeal litigation" is the only one in this case.

4. There Was No Abuse of the Writ by Smith

The State is surely correct that the history of this case is a "legal labyrinth" (Pet. 32), but the labyrinth is no fault of the respondent, and the charge of "abuse of the writ" is yet another irony. This Court rejected the charge of "abuse" when it remanded for a hearing on this petition. *Smith* v. *Yeager,* 393 U.S. 122 (1968). An earlier petition had been filed prior to *Townsend* v. *Sain, supra,* when the right to an evidentiary hearing was narrowly constricted by *Brown* v. *Allen,* 344 U.S. 443 (1953), but that petition was denied, without an evidentiary hearing. *United States ex rel. Smith* v. *New Jersey,* 201 F. Supp. 272 (D.N.J. 1962), aff'd. 322 F. 2d 810 (3rd Cir. 1963).

This petition was filed in 1965, early in the reign of *Townsend* and after final exhaustion of the search for relief in the State post-conviction process. *State* v. *Smith,* 43 N.J. 67 (1964). For six years, Smith did no more than seek an evidentiary hearing. First, the federal courts blocked him for three years with the "waiver" holding that it took this Court to upset.

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[22] The State concedes that "comity" is not a jurisdictional doctrine. (Pet. 23, note 10). Permitting the State to use these statements, but postpone resolution of the issues they raise even when a complete record has been compiled, would have worked "manifest injustice" sufficient to overcome the interest of comity. *Fay* v. *Noia,* 372 U.S. 31, 420-441 (1963).

Smith v. *Yeager, supra.* Indeed, even after this Court's remand, it took two more years before the New Jersey District Court even set a date for the hearing which finally vindicated him. Until this hearing, no court, State or Federal, had heard evidence as to five of the six statements ultimately held coerced. Only the trial court heard some testimony on the sixth. The charge of "systematic relitigation" is thus baseless, for it is simply false to say that Smith's "applications for habeas corpus and post-conviction relief were considered and rejected on their merits". (Pet. 33). They were considered and rejected, time after time, on no more than the moving papers and the scant trial transcript.

In short, Smith has "relitigated" nothing. Save for some evidence as to one statement at trial, this case represents the first litigation of the truth of Smith's claims. The truth is now known. That it took a fourteen-year struggle just to give it a hearing may be an abuse, but is not an "abuse" of the Writ that finally prevailed.

It "needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. . . . We must be deaf to all suggestions that a valid appeal to the Constitution . . . comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands". *Chessman* v. *Teets,* 354 U.S. 156, 165 (1957). (Harlan, J. for the Court). See also, *Sheppard* v. *Maxwell, cert. den. sub. nom. Sheppard* v. *Ohio,* 352 U.S. 910 (1956); *cert. granted,* 382 U.S. 916 (1965), rev'd., 384 U.S. 337 (1966); *Rogers* v *Richmond, cert. den. sub. nom.; Rogers* v.

Connecticut, 351 U.S. 952 (1956), *cert. den.* 357 U.S. 220 (1958), cert. granted, 361 U.S. 959 (1960), rev'd. 365 U.S. 534 (1961).

CONCLUSION

It is respectfully prayed that the petition for writ of certiorari be denied.

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APPENDIX

Statutes Involved

1. 28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct,

unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs

numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

As amended Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.

2. N.J.S. 2A:163-2. Finding of Insanity; Disposition

2A:163-2. Finding of insanity; disposition

If any person in confinement under commitment, indictment or under any process, shall appear to be insane, the assignment judge, or judge of the county court of the county

in which such person is confined, may, upon presentation to him of the application and certificates as provided in Title 30, chapter 4, of the Revised Statutes, institute an inquiry and take proofs as to the mental condition of such person. The proofs herein referred to may include testimony of qualified psychiatrists to be taken in open court by the judge, either in the presence of a jury specially impanelled to try the issue of insanity alone, or without a jury, as the judge in his discretion may determine. It shall be competent for the judge if sitting without a jury, or the jury, if one is impanelled, to determine not only the sanity of the accused at the time of the hearing, but as well the sanity of the accused at the time the offense charged against him is alleged to have been committed.

If it shall be determined after hearing as aforesaid, that the accused was sane at the time the offense charged against him is alleged to have been committed, but is insane at the time of the hearing, the judge shall order such person removed from imprisonment and to be confined in an institution as provided by section 30.4-82 of the Revised Statutes, and his custody and release from such institution shall be governed by the provisions of said section.

If it shall be determined after hearing as aforesaid, that the accused was insane at the time the offense charged against him is alleged to have been committed, the charge against him shall be dismissed on this ground and the records of the proceedings so noted. In this event, the judge or jury, as the case may be, shall also find separately whether his insanity in any degree continues, and, if it does, shall order him into safe custody and direct him to be sent to the New Jersey state hospital at Trenton, to be confined as otherwise provided by law, and maintained as to expense as is otherwise provided for the maintenance of the criminal insane, until such time as he may be restored to reason, and no person so confined shall be released from such confinement except upon the order of the court by which he was committed. This section shall

not be construed to prevent the use of the writ of habeas corpus.

A finding of sanity at the time of the commission of the offense charged against such person in this proceeding shall not preclude the accused from interposing the defense of insanity at any subsequnt trial of the offense charged.

Rules Involved

1. N.J.R.R. 3:2-3

Proceedings Before the Magistrate

(a) Appearances

An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith.

(b) Statement of the Magistrate

The magistrate shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him.